BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition for Declaratory Ruling	)	MB Docket No.10-215
Regarding Negative Option	)	CSR _____
Billing Restrictions	)	

To: Chief, Media Bureau

OPPOSITION TO PETITION FOR DECLARATORY RULING; DECLARATION OF DOUGLAS CAIAFA IN SUPPORT THEREOF

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November 9, 2010

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SUMMARY

The case pending before the Superior Court in Los Angeles[1] is quite different from the one portrayed by Time Warner Cable, Inc. ("TWC" or "Time Warner") in its Petition. Specifically, Plaintiffs operative Second Amended Complaint ("SAC") (Exh.1 to Declaration of Douglas Caiafa ("Caiafa Dec.") does not purport to advise TWC as to *how* it should comply with §543(f). Rather, it simply alleges that TWC has violated and continues to violate the statute. The SAC alleges a single claim for violation of California *Business & Professions Code §*17200 based on TWC's violation of 47 U.S.C. §543(f). The Superior Court action contends, and the evidence has shown after 2 ½ years of law and motion and discovery, that TWC has failed to comply with the terms of §543(f), and that neither its standardized Subscriber Agreement nor Work Order, nor its uniform sales practices reveal that an "affirmative request by name" was obtained from any customer for equipment as required by §543(f).

Moreover, because TWC chose to include a complete integration clause in its Subscriber Agreement which effectively supercedes any oral request for equipment, only TWC's Subscriber Agreement and Work Order can be considered when determining whether TWC has complied with the statute, not its oral ordering practices. Thus, the entire discussion of its CSRs' common practices and sales scripts has been rendered moot by virtue of TWC's integrated contract documents. Finally, the proper application and effect of the integration clause in TWC's contract is an issue of California contract law which should be properly decided by the Superior Court of

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[1] *Mark Swinegar, et al. v. Time Warner Cable, Inc.*, filed April 28, 2008, L.A.S.C. Case No. BC 389755.

California.[2]

The case pending before the Superior Court in Los Angeles[3] is quite different from the one portrayed by Time Warner Cable, Inc. ("TWC" or "Time Warner") in its Petition. Specifically, Plaintiffs operative Second Amended Complaint ("SAC") (Exh.1 to Declaration of Douglas Caiafa ("Caiafa Dec.") does not purport to advise TWC as to *how* it should comply with §543(f). Rather, it simply alleges that TWC has violated and continues to violate the statute. The SAC alleges a single claim for violation of California *Business & Professions Code §*17200 based on TWC's violation of 47 U.S.C. §543(f). The Superior Court action contends, and the evidence has shown after 2 ½ years of law and motion and discovery, that TWC has failed to comply with the terms of §543(f), and that neither its standardized Subscriber Agreement nor Work Order, nor its uniform sales practices reveal that an "affirmative request by name" was obtained from any customer for equipment as required by §543(f).

Moreover, because TWC chose to include a complete integration clause in its Subscriber Agreement which effectively supercedes any oral request for equipment, only TWC's Subscriber Agreement and Work Order can be considered when determining whether TWC has complied with the statute, not its oral ordering practices. Thus, the entire discussion of its CSRs' common practices and sales scripts has been rendered moot by virtue of TWC's integrated contract documents. Finally, the proper application and effect of the integration clause in TWC's contract

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[2] As stated in the FCC's 1993 Rate Order, "[I]ssues arising under the negative option billing provision may often be contractual in nature, and capable of being redressed in the local courts."

[3] *Mark Swinegar, et al. v. Time Warner Cable, Inc.*, filed April 28, 2008, L.A.S.C. Case No. BC 389755.

is an issue of California contract law which should be properly decided by the Superior Court of California.[4]

Despite TWC's assertions to the contrary, Plaintiffs' "view" of §543(f) [623(f)] is anything but "extreme." TWC's claim that the Superior Court needs the Commission to interpret §543(f) to "sharpen the focus and narrow the issues" and "promote judicial economy" does not ring true. Rather, its Petition can accurately be seen as a last ditch attempt to avoid the rulings of the trial court on issues which TWC specifically requested it rule upon. The court *has* indeed focused on the critical issues raised in the underlying litigation and has engaged in a reasoned analysis of the underlying facts as applied to California consumer protection law in reaching its conclusions. These are the rulings TWC now hopes to avoid by taking its case to the Commission. It should be understood, however, that it was only *after* 2 ½ years of litigation, *after* depositions of Time Warner's Person Most Qualified ("PMQ"), David Su, *after* depositions of Time Warner's CSRs, *after* depositions of the named Plaintiffs, as well as other depositions, *after* demurrer hearings and *after* Defendant's failed Motion for Summary Judgment, that the Superior Court examined and weighed the evidence and ruled against TWC. It was then, and only then, that TWC suddenly reversed course and decided that it did not want the trial court to interpret its behavior in relation to §543(f), and that the Commission was the only appropriate body to interpret the meaning of §543(f). It was only *after* Defendant twice asked the Superior Court to determine the meaning of §543(f)'s "affirmative request" requirement by way of demurrer and then Summary Judgment, and received an answer it neither anticipated nor liked,

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[4] As stated in the FCC's 1993 Rate Order, "[I]ssues arising under the negative option billing provision may often be contractual in nature, and capable of being redressed in the local courts."

that TWC decided to impermissibly shop for a more receptive forum.[5] It was only *after* it lost its Motion for Summary Judgment, more than 2 years after this litigation was commenced, that TWC suddenly decided that the trial court was incapable of deciding, without the input of the Commission, the exact issue TWC had asked it to resolve on no less than two separate occasions.

Contrary to TWC's assertion, it was not the intent of Congress that the Commission take on the role of interpreter of *statutes* such as §543(f), much less the exclusive interpreter. Instead, it has always been the intent of Congress that statutory interpretation and construction be the province of the courts, and that the Commission be available to interpret its own *rules or definitions*. (See, FCC 1993 Rate Order at 5905).

As recognized in the Commission's 1994 Rate Order, since "state and local consumer protection laws apply to negative option billing practices," and since "enforcement [can] proceed under state and local law as well as under federal law," the Superior Court of California has the full right and authority to resolve the negative option billing dispute put before it by the underlying consumer protection action brought by Plaintiffs. (*Id.* at 1994 WL 667966 (F.C.C.), at 34).

Even if the Commission were to review TWC's sales practices and render an opinion as to whether they show compliance with §543(f), the Commission will conclude that TWC's

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[5] In denying TWC's motion for summary judgment, the Court ruled: "The plain language of the statute [§543(f)] is unambiguous and . . . the statute unequivocally requires an 'affirmative request by name.' . . . An interpretation of affirmative request to 'assent' [as TWC proposes] would directly contradict the words of the statute and the clear purpose of the Act, which was to protect consumers and promote competition through regulation of cable operators." (Exh. 2, Order re MSJ at 7:3-10).

uniform sales practices do not comport with §543(f)'s requirements. Moreover, the factual and legal analysis as to whether TWC's practices constitute compliance has been addressed and is better addressed by the trial court based on a full record and full discovery. The "evidence" of TWC's practices offered in its Petition is either inaccurate, incomplete and/or selective.

For example, TWC conceals from the Commission the fact that it does not even "inform" its California customers that they will receive and pay extra for, or obtain "informed consent" for the receipt of, remote control devices, much less obtain an "affirmative request." The trial court has found, and TWC has admitted that:

> . . . Defendant's customer service representatives are not trained to inform, and do not inform, customers that they will receive a remote with every converter, or that they will pay a separate monthly fee for each remote they receive. ([Undisputed Material Fact] UMF 94).

(Exh. 2, Order re MSJ at 4:18-23., Exh. 3, Plaintiffs' Separate Statement of Undisputed and Disputed Material Facts). The court's ruling was supported by ample and undisputed evidence introduced through the testimony of TWC's own witnesses, testimony and evidence TWC now conceals from the Commission.

TWC also conceals the "mystery fees" it charges customers known as "digital programming fees." TWC's CSRs have testified at deposition that they "are not trained to discuss the digital programming fee with customers," before charging them. (Exh. 4, Smith Depo., p. 127/6-8). These charges suddenly appear on subscribers' bills without any prior mention by TWC in its contracts and no mention by its CSRs (since they are not trained to disclose it). Plaintiffs assert this is a violation of statute and that moreover, these fees can be fairly characterized as "mystery fees" and/or can and do result in "bill shock." Given that one of

the Commission's primary goals is to empower consumers, Defendant must not be permitted to systematically violate §543(f)'s prohibition against negative option billing. It must conform its practices to the statute, not seek to change the words of the statute to conform to its practices. Compliance should not be looked upon as an "undue burden" on cable operators or something to circumvent, it should be looked upon as an opportunity to ensure the protection to which Congress decided every consumer is entitled.

The actual facts and evidence adduced thus far in the trial court show the opposite of what TWC asserts; namely, that TWC's standardized documents do not constitute or evidence an affirmative request for equipment, that those standardized documents are integrated and supercede any oral agreements for equipment between TWC and its California customers, and that its uniform sales practices "in no way, shape or form" (as stated by the Superior Court) comport with §543(f).

TWC asks the Commission to interpret §543(f) in a manner at odds with the statute's plain language to suit its own desired ends. TWC's sole argument for the adoption of its interpretation of §543(f) is that the legislative history of the Cable Act suggests that the term "affirmative request" should be read to mean nothing more than "assent" or "consent." TWC's interpretation, however, is fatally flawed. First, it has failed to engage in the most basic task of statutory interpretation: analysis of the words of the statute themselves. In addition, the "legislative history" relied on by TWC is not legislative history at all, but rather post-enactment agency analysis of dramatically dissimilar issues. Finally, TWC has entirely ignored the purposes of the statute at issue, which include the regulation of cable operators such as TWC, and the protection of cable consumers such as Plaintiffs. A proper and thorough analysis of

§543(f) reveals that the words as written, debated, revised, and passed by both houses of the Legislature over a Presidential veto, should be given their literal meaning, not Defendant's subsequent interpretation which ignores half the text.

An interpretation of §543(f) which gives meaning to the express language of the statute would not "add complexity and burdens" to the ordering process. Quite the opposite. TWC must simply comply with the words of the statute. If it uses written documentation to obtain an affirmative request for equipment, the written document must indicate that the subscriber has indeed requested the specific equipment listed. Neither TWC's Subscriber Agreement nor its Work Order do this. Since TWC has chosen to prohibit reference to any oral communications between its employees and its California customers by virtue of its integrated contract documents, TWC must simply ensure that its documents are clear, unambiguous and reveal that its customers have indeed "affirmatively requested by name" each piece of equipment they are charged for. This is neither a difficult nor complex task, merely one that TWC seeks to avoid.

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To: Chief, Media Bureau

OPPOSITION TO PETITION FOR DECLARATORY RULING

I. Introduction

The issues framed by TWC's Petition For Declaratory Ruling, as summarized in the Commission's Public Notice issued on October 20, 2010, are:

(1) Whether Section 623(f) ("§543(f)") is satisfied by a subscriber's "affirmative assent;" and, (2) Whether TWC's ordering process complies with the negative option billing restriction of §543(f).

First, the plain language of §543(f) reveals that it is not satisfied by "assent" or "consent," but requires exactly what it says: an "affirmative request by name." In fact, 47 C.F.R. §76.981, the regulation drafted by the Commission to help implement §543(f), confirms this. The Commission's regulation reiterates the words of the statute verbatim, and does not in any way alter or deviate from the requirement that a cable operator obtain a consumer's "affirmative request by name" for equipment before the operator may lawfully charge the consumer.

Second, TWC's common ordering practices in no way comply with the law and TWC has failed to present any "pertinent facts" to that effect as required by 47 CFR §76.67(4). TWC concedes in its Petition that in order to charge its customers for cable services and/or equipment, "**the customer must affirmatively request the named cable service and/or equipment, having been told that charges will apply**." (Petition, p. 6). Plaintiffs agree that where the subscriber affirmatively requests equipment by name before being charged, a cable operator has complied with the statute. Unfortunately, however, TWC does not require that its customers "affirmatively request" any equipment, as the statute and regulation require. Rather, TWC, allegedly, merely requires that its customers "consent" or "assent" to the receipt of equipment. A plain reading of the words of both the statute and the accompanying regulation reveal that

"consent" or "assent" to receipt of equipment is insufficient to comply with the statute.

TWC's standardized Subscriber Agreement and Work Order contain no language that can reasonably be construed as evidencing an affirmative request for equipment. Moreover, TWC's uniform sales practices and sales scripts, even if they were to be considered despite being superceded by TWC's completely integrated contract, in no way ensure that any subscriber affirmatively requests the equipment they are charged for.

II. Procedural and Factual Background

The underlying action was filed in Los Angeles Superior Court on April 28, 2008, and brought pursuant to California's consumer protection statute, California *Business & Professions Code* §17200 *et seq.* (commonly referred to as California's "Unfair Competition Law" or "UCL"). California's UCL provides that any business act or practice that violates, among other things, a federal statute is an unlawful business practice and constitutes a violation of California's consumer protection law. Plaintiffs' SAC alleges that TWC has engaged in unlawful business acts and practices because it has systematically violated §543(f)'s prohibition against negative option billing by charging its customers for converter boxes and remote controls which its customers have not "affirmatively requested by name."

Plaintiffs' SAC does not allege that TWC has violated any Commission rule, or regulation, or anything other than §543(f). In addition, Plaintiffs' SAC does not allege that TWC's customers must utter some "magic words" for TWC to comply with the statute. Nor does the SAC allege that TWC has failed to obtain any customer's "consent" or "assent" to receipt of cable television equipment. The SAC simply alleges that the Cable Act requires an "affirmative request by name," TWC's customers in California do not "affirmatively request by

name" the equipment they are charged for, and as a result TWC has violated §543(f) and California's UCL.

The precise issue in this case raised by TWC's instant Petition is whether §543(f) requires an "affirmative request by name," or "informed consent." That issue is easily resolved by reference to the language of the statute alone. *National Ass'n of Homebuilders v. Defenders of Wildlife* (2007) 551 U.S. 644, 665. Congress has directly addressed that precise question through the statutory text.

In response to Plaintiffs' SAC, TWC has alleged that, despite what §543(f) might actually say, it, for some reason, is not required to obtain a customer's "affirmative request" for equipment before it may lawfully charge a rental fee for the equipment. Rather, TWC has alleged that so long as its customers "consent" or "assent" to receipt of equipment, then it is free to simply add monthly rental charges onto their bills. TWC has consistently argued that when Congress and the Commission chose to use the words "affirmative request by name," they did not actually mean "affirmative request by name." In fact, in December 2008, TWC brought a demurrer to Plaintiffs' SAC and asked the trial court to resolve this controversy and agree that §543(f)'s "affirmative request" requirement does not actually require an "affirmative request by name," but rather merely requires "consent" or "assent." In February 2009, the court overruled TWC's demurrer, finding:

> . . . the plain language of the statute [§543(f)] is unambiguous and . . . unequivocally requires an "affirmative request by name." This interpretation is supported by the second sentence of the statute that "a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment." An interpretation of affirmative request to "assent" [as Time Warner proposes] would directly contradict the words of the statute and the clear purpose of the Act, which

was to protect consumers and promote competition through regulation of cable operators.

(Exh.5, Order Overruling Demurrer To Second Amended Complaint, 4/24-5/5).

Nine months later, TWC once again requested that the trial court, not the Commission, resolve the present dispute. TWC brought a motion for summary judgment which once again asked the court to find that §543(f) merely requires "consent" as opposed to an "affirmative request by name." On July 29, 2010, the court denied Defendant's Motion for Summary Judgment re-affirming its prior ruling and reiterating that the statute is clear and unambiguous as it applies to the "affirmative request by name" requirement. The court once again ruled that an interpretation which would require only "consent" or "assent" would directly contradict the words of the statute.

The evidence produced in this case over the past 2 ½ years of litigation in the trial court shows that: (1) TWC has a contractual relationship with each of its customers in California which is governed by the same, identical contract documents (i.e., the Work Order and Subscriber Agreement); (2) TWC interacts and communicates with each of its California customers in the same, common and uniform manner; (3) TWC does not get an "affirmative request by name" from any customer for any equipment; (4) According to TWC itself, at best, it obtains the "informed consent" of its customers for the receipt of equipment; (5) TWC follows common practices and procedures, pursuant to common company-wide policies, which govern the way in which its sales employees (i.e., "customer service representatives" or "CSRs") communicate with customers; (6) CSRs are trained only to introduce cable television packages to customers, inform customers that additional equipment charges may apply, and get the

customer's consent to placing an order for the total package price; (7) CSRs are not trained to obtain any customer's affirmative request for equipment; (8) CSRs are not trained to even inform customers that they will receive much less pay an extra monthly fee for remote controls; and, (9) TWC sends each customer one remote with every converter without the customer's consent.

The documentary evidence and testimony of TWC's Person Most Knowledgeable as well as its CRSs establish that:

1. TWC's Subscriber Agreement provides that the Subscriber Agreement, Work Order and Terms of Use (collectively, the "contract") constitute the "entire agreement" between TWC and Plaintiffs, and supercede any previous written or oral agreements between the parties (including conversations with TWC employees) (Exh. 3, Plaintiffs' Separate Statement of Disputed and Undisputed Material Facts ("Seperate Statement"), Triable Issue of Material Fact "TIMF" No. 27);
2. Nothing in the Subscriber Agreement evidences or constitutes an "affirmative request by name" for a converter or remote (Exh. 3, TIMF Nos. 41, 42);
3. TWC's CSRs are not required to obtain a customer's affirmative request for equipment before including it in their order (Exh. 3, TIMF Nos.63, 65, 92);
4. TWC charges each customer a separate monthly fee for each remote which TWC automatically sends to them (Exh. 3, TIMF No. 70; Exh. 15);
5. TWC's CSRs are not trained to inform, and do not inform, customers that they will receive a remote with every converter, or that they will pay a separate monthly fee for each remote they receive (Exh. 3, TIMF Nos. 93, 94);
6. TWC's CSRs do not ask customers whether they want a remote (Exh. 3, TIMF No. 68);
7. TWC CSRs do not inform each subscriber of applicable equipment charges when taking their orders (Exh. 3, Def. UMF No. 4; TIMF Nos. 60, 66);
8. TWC charges a "digital programming fee" ("DPF") which increases the amount

charged to customers for each additional converter box over and above the first (Exh. 3, TIMF 76);

9. Customers are not told what the DPF is for (Exh. 3, TIMF 75);

10. TWC's witnesses have testified that the only purpose of the DPF is to increase the cost to consumers for additional equipment (Exh. 3, TIMF 79).

(Exh. 3, Separate Statement; Exh. 6, TWC Subscriber Agreement).

III. Legal Background

The legislative history of 47 U.S.C. §543(f) supports a literal reading of its words, rather than the watered-down reinterpretation offered by Defendant. In the statutory interpretive process, where the statutory language at issue is clear and unambiguous, the task of interpreting the language comes to an end, "for there is no need for judicial construction." *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083; *National Ass'n of Homebuilders v. Defenders of Wildlife* (2007) 551 U.S. 644, 665. Here, the language is clear and the trial court has already determined, on two separate occasions, that "the plain language of the statute [§543(f)] is unambiguous and . . . unequivocally requires an 'affirmative request by name,'" and that TWC's proposed interpretation "would directly contradict the words of the statute and the clear purpose of the Act, which was to protect consumers and promote competition through regulation of cable operators." (Exh. 2, Order re MSJ at p.7.). Clearly, §543(f) requires that cable customers must "affirmatively request" any equipment "by name" before a cable operator may charge them a rental fee for it; simply failing to object to receipt of such equipment, or merely consenting to its receipt, is not enough.

A thorough analysis of the legislative history of the Cable Act, with particular emphasis on §543(f), supports Plaintiffs' interpretation here. The first thing to note from the legislative

history is that the Cable Act was prompted by congressional concern for one thing: the protection of cable consumers. Among the Cable Act's many consumer protection and regulatory provisions are provisions which: regulate rates for basic cable and equipment (*Id.* at 180); attempted to prevent loopholes by giving the Commission power to set standards and guidelines to prevent cable operators from evading rate regulation; set minimum service standards (*Id.*); require cable operators to offer customers the option of having their service delivered directly to their television sets without passing through a converter box (*Id.*); required cable operators to allow customers who did not wish to use a converter box, and who had cable-ready televisions, to opt to have the operator install or reinstall their service without the use of a converter box (*Id.*); barred cable operators from "charging for any service or equipment not affirmatively and specifically requested by a subscriber." (*Id.* at 181); and, "required that nothing in the law could alter or restrict the applicability of any federal or state unfair competition laws." (*Id.* at 183).

The end result of a review of the legislative history of the Cable Act is that a plain reading of the language of §543(f) as proposed by Plaintiffs is the only reasonable interpretation. Conversely, after reviewing the legislative history, the interpretation offered by TWC appears even more unwarranted.

The third and final step in the statutory interpretation process is to "apply reason, practicality and common sense to the language at hand." *MacIsaac*, 134 Cal.App.4th at 1084. "If [and only if] ambiguity remains after resort to secondary rules of construction and to the statute's legislative history, then we must cautiously take the third and final step in the interpretative process." *Id.* If we engage in this final phase of the interpretative process, we must always keep in mind that "courts seek to ascertain the intent of the Legislature for a reason – '*to*

effectuate the purpose of the law.'" *Id.* (emphasis in original). To that end, if one were to adopt TWC's interpretation here, the second sentence of §543(f) would effectively be deleted and read out of the statute or rendered meaningless. If all that is required to satisfy §543(f)'s "affirmative request" requirement is for a consumer to have been found to have "consented" to a cable operator's provision of equipment, the second sentence of that section is mere surplusage and of absolutely no effect.

As noted above, the second sentence of Section 543(f) effectively says, without actually using the word "consent," that mere "consent" is not enough. "Consent" is synonymous with "acquiescence." "Acquiescence" is defined as, among other things, a failure to object. Therefore, to "consent" is, among other things, to fail to object or fail to refuse a proposal. However, with respect to being charged for cable television equipment, Congress has unequivocally stated that a consumer's "failure to refuse a cable operator's proposal" to rent equipment is not sufficient to satisfy §543(f)'s "affirmative request" requirement. Accordingly, a consumer's "consent" to receipt of equipment is likewise not sufficient.

Any interpretation of the phrase "affirmative request by name" must be no more than what the words of the statute themselves can bear. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.* (1994) 512 U.S. 218, 229. Because requiring only "consent" or "assent" would eviscerate the entire second sentence of the statute, the only logical and permissible interpretation of §543(f) is that "consent" or "assent" to receipt of equipment is simply not enough. See *Corley v. U.S.* (2009) 129 S.Ct. 1558, 1567 ("one of the most basic interpretive canons [of statutory construction is] that no part will be inoperative or superfluous, void or insignificant."). Defendant's interpretation would at the very least make the second sentence of §543(f)

superfluous and/or insignificant.

Finally, TWC's citation to *Warner Cable Communications, Milwaukee, Wisconsin*, 10 FCC Rcd 2103, ¶13 (Cab. Serv. Bur. 1995), only serves to support Plaintiffs' claim that "affirmative request" means "affirmative request." The legislative purpose highlighted by Defendant is that "the restrictions of this provision [§543(f)] protect subscribers from having to take on the burden of identifying and negatively responding to charges for services that appear on a bill that are not desired ***and for which no request has been made***." (Emphasis added).

Moreover, the Commission has consistently directed that compliance with §543(f) requires an "affirmative request by name." The regulation, drafted by the Commission itself, 47 C.F.R. §76.981, reiterates word-for-word the statutory prohibition against charging for equipment that a customer has not "affirmatively requested by name."

IV. The Commission Should Refrain From Rendering An Opinion Here

TWC's Petition seeks the Commission's opinion on two issues: First, whether obtaining a customer's "consent" or "assent" to receipt of cable equipment satisfies §543(f)'s "affirmative request by name" requirement; and, second, whether TWC's [alleged] ordering process complies with the negative billing restrictions of §543(f). For the following reasons, the Commission should decline both requests.

A. TWC Requested the California Superior Court to Resolve the Issue Here Twice Over a 2 ½ Year Period Before Seeking the Commission's Involvement

The lawsuit at issue here was filed in Los Angeles Superior Court on April 28, 2008, over 2 ½ years ago. TWC immediately removed the case to federal court under the Class Action Fairness Act. However, TWC refused to admit that there was over $5 million in controversy

here, and the federal court remanded the case back to state Court. After months of law and motion and discovery, Plaintiffs filed their SAC on November 14, 2008.

In December 2008, TWC brought the issues presented here before the local trial court by way of demurrer which asked the court to agree that to satisfy their obligation under §543(f) to obtain a customer's "affirmative request by name" for converters and/or remotes, TWC need only obtain a customer's "consent" or "assent" to receipt of cable television equipment. On February 23, 2009, the court issued an order overruling TWC's demurrer and finding, among other things, that the language of §543(f) is plain and unambiguous and requires an "affirmative request by name," and that merely obtaining a customer's "consent" or "assent" to receipt of equipment does not satisfy the statute.

Throughout the 2 ½ years of this litigation, the parties have engaged in extensive and contentious discovery. Multiple depositions were taken, including both Plaintiffs, TWC's sales and installation personnel, TWC's designated PMK's, as well as non-parties. Hundreds of interrogatories were propounded, responded to, fought over, and supplemented. Requests for admissions and document demands have been propounded and responded to. Motions to compel were brought. A restraining order was granted requiring TWC to preserve millions of recorded sales calls. After extensive negotiations, 148 recordings of sales calls were ultimately reviewed, redacted and produced by TWC. Countless hours of recorded sales calls were reviewed by the parties and the court. Random samples of witnesses were identified for contact by Plaintiffs' counsel. And thousands of documents have been produced and reviewed.

On November 16, 2009, TWC again, for a second time, brought the issues presented here to the trial court for resolution by way of a motion for summary judgment, arguing again that its

practice of obtaining a customer's "informed consent" or "assent" to the receipt of cable television equipment satisfies its statutory obligation under the Cable Act. After additional discovery, extensive briefing and oral argument, on July 29, 2010, the court once again rejected TWC's interpretation of the plain language of §543(f) and denied TWCs motion for summary judgment, holding that, among other things, §543(f) requires an "affirmative request by name" and that TWC had not shown that its common policies and sales practices satisfy the plain language of the statute or otherwise comply with the law.

Having litigated these issues before the trial court for 2 ½ years, and having not received the response it was hoping for, TWC has belatedly made the tactical decision to bring the instant Petition to the Commission, while at the same time seeking to stay all further proceedings in the trial court. However, the factual scenario presented by TWC to the Commission in the present Petition is far different from the actual undisputed facts established in the trial court after 2 ½ years of litigation and discovery. For example, in its Petition to the Commission, TWC misleadingly asserts that "TWC does not bill customers based on mere 'silence' or 'acquiescence' by the customer in response to the CSR's offer. Rather, ***the consumer must affirmatively request the named*** cable service and/or ***equipment***, having been told that charges will apply." TWC's Petition for Declaratory Ruling at p. 6 (emphasis added). This misstatement of the facts is diametrically opposed to both the undisputed facts discovered in the litigation as well as TWC's arguments and theories it has advanced in the trial court throughout this litigation.

TWC tellingly fails to explain, or even address, why it did not seek the Commission's guidance for the benefit of the trial court at the time it asked the court to decide these same issues on demurrer. Nor does TWC explain, or address, why it did not feel that the court would

"benefit immensely" by the Commission's opinion prior to reviewing, analyzing, researching and ruling on TWC's motion for summary judgment.

The only logical explanation for TWC's filing of the instant Petition is that its true intent is to further delay this case, needlessly increase the cost of litigation, put additional pressure on Plaintiffs to settle their claims, and impermissibly shop for a more receptive forum. Such motives militate against the Commission's involvement here. See *South Bay Creditors Trust*, 69 Cal.App.4th at 1081 (increased "expense and delay to litigants" militates against application of the doctrine of primary jurisdiction).

B. The Language of the Statute is Clear and Unambiguous

Despite Defendant's insistence to the contrary, the Commission has never held that a cable operator may satisfy its statutory obligations under §543(f) by obtaining a customer's "informed consent," or "assent." In fact, the Commission has consistently stated that compliance with §543(f) requires nothing less than an "affirmative request by name." For example, in its 1993 Rate Order the Commission found:

> We find that, under the 1992 Cable Act, to be billed for any cable service a subscriber must ***affirmatively request*** such service. . . . The statutory language on negative option billing applies to "any service or equipment."

1993 FCC Rate Order at 5904-5905. Again, in 1994, the Commission clearly stated:

> negative option billing . . . occurs when a cable operator charges a subscriber for any service or equipment that the subscriber has not ***affirmatively requested by name.***

1994 FCC Rate Order, 1994 WL 667966 (F.C.C.), at 30.

In conformity with this consistent position, the Commission promulgated a regulation in connection with §543(f) which again requires a cable operator to obtain a customer's

"affirmative request by name" for equipment. 47 C.F.R. §76.981 provides:

> (a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not ***affirmatively requested by name.*** A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an ***affirmative request*** for service or equipment. A subscriber's ***affirmative request*** for service or equipment may be made orally or in writing.

It is simply untrue that when interpreting §543(f) and drafting a regulation to assist in the implementation and/or enforcement of it, that the Commission ever interpreted the phrase "affirmative request by name" to mean anything other than "affirmative request by name." The Commission has never said that "an operator may not charge a subscriber for equipment unless the operator obtains the customer's informed consent." This alleged "informed consent" standard is simply a theory invented by TWC in an attempt to convince the trial court that its unlawful conduct actually satisfies the statutory requirements of §543(f).

C. Local Courts Should Resolve Negative Option Billing Disputes, Such As This One, Especially Where the Language of a Contract Governs the Entire Relationship Between the Parties

TWC contends in its Petition (at p. 20) that "the Commission, not the courts, is the expert authority best equipped to decide the exact requirements, application and scope of Section 623(f)." While the Commission is equipped and has the authority to interpret its own rules, it certainly is not the exclusive authority to determine whether TWC's practices in California comply with §543(f), or for that matter whether its practices constitute an "affirmative request," "informed consent," "assent," or some other standard proposed by TWC.

Despite TWC's contention here, the local trial court is clearly authorized to enforce §543(f)'s negative option billing requirements. The Commission itself has repeatedly recognized and held that private enforcement of §543(f) may, and should, proceed alongside, and in addition

to, agency enforcement (if any) by way of state consumer protection laws:

> We have recognized that negative option billing practices are also usually "in the nature of a consumer protection measure rather than a rate regulation provision per se." Hence, state and local consumer protection laws apply to negative option billing practices. For example, if a cable operator engaged in a practice that violated the terms of the negative option billing provision added by the 1992 Cable Act and the terms of a state or local negative option billing rule, enforcement could proceed under state and local law as well as under federal law. . . . Congress has not so comprehensively occupied the cable field that there is no room for the enforcement of state consumer protection laws.

1994 FCC Rate Order, 1994 WL 667966 (F.C.C.), at 34. Thus, the Commission has consistently recognized that state consumer protection laws such as California's UCL, apply to negative option billing practices, and that claims arising under such laws may properly be addressed and enforced by local courts such as the L.A. Superior Court.

TWC contends that the Commission has allegedly instructed that interpretation of §543(f) is "appropriately resolved by the Commission as an expert agency." However, the Commission's 1993 Rate Order relied on by TWC does not stand for that proposition. The Rate Order in question reads as follows:

> [I]ssues arising under the negative option billing provision may often be ***contractual in nature, and capable of being redressed in the local courts***. For example, subscribers charged in violation of the statute and our rules would not have to pay the illegal charge. Should the operator believe the charge is permissible, the onus would be on it to attempt to collect through the judicial process. However, our existing procedures would ***also be available*** in cases involving, for example, ***interpretation of our rules or definitions***, that would be more easily and *appropriately resolved by the Commission as an expert agency.* In either case, our forfeiture provisions would apply to violations of Section [543(f)] or our negative option billing rules and could be used to help deter or correct any patterns of violation of these rules.

1993 FCC Rate Order at 5905. In fact, what the Commission instructed is not that it should be charged with interpretation of §543(f), as TWC falsely claims. What the Commission instructed